

SERVICE DATE – NOVEMBER 16, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36041

TESORO REFINING & MARKETING COMPANY, LLC—PETITION FOR
DECLARATORY ORDER

Digest:¹ This decision denies a request that the Board issue a declaratory order finding that 49 U.S.C. § 10501(b) preempts claims of a Native American tribe in pending federal district court litigation between that tribe and a railroad.

Decided: November 14, 2016

On June 3, 2016, Tesoro Refining & Marketing Company, LLC (Tesoro), an independent refiner and marketer of petroleum products, filed a petition requesting that the Board issue a declaratory order under 5 U.S.C. § 554(e) and former 49 U.S.C. § 721 (now 49 U.S.C. § 1321) affirming its rights as a shipper under federal law to receive transportation service over rail lines that it asserts are subject to the jurisdiction of the Surface Transportation Board (STB or Board). Specifically, Tesoro argues that: (1) 49 U.S.C. § 10501(b) protects Tesoro's right to receive rail service for the delivery of oil, including Bakken crude, and other feedstocks and intermediate and finished products to and from its refinery in Anacortes, Wash.; and (2) Tesoro's right to receive rail service may not be infringed upon by a contract concerning right-of-way access between the Swinomish Indian Tribal Community (Swinomish Tribe or Tribe) and BNSF Railway Co. (BNSF).

As discussed below, Tesoro's petition for declaratory order will be denied.

BACKGROUND

Tesoro states that its refinery, located about 70 miles north of Seattle, Wash., primarily supplies gasoline, jet fuel, and diesel fuel to markets in Washington and Oregon. According to Tesoro, the refinery receives its crude feedstock by three modes of transport: (1) a pipeline from Canada; (2) maritime tankers; and (3) rail service provided by BNSF over a rail line that extends across tribal lands (the Anacortes Subdivision). Tesoro asserts that it also relies on rail to transport certain intermediate and finished products to and from the refinery. Tesoro states that no common carriers other than BNSF provide rail service to this area.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

According to Tesoro, the Swinomish Tribe, a federally recognized tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 476, occupies the Swinomish Indian Reservation (the Reservation), located on Fidalgo Island in Skagit County, Wash. The Anacortes Subdivision, over which BNSF operates to serve Tesoro, runs along the northern edge of the Reservation.

Federal Court Litigation. Tesoro states that on April 7, 2015, the Swinomish Tribe filed suit against BNSF in the U.S. District Court for the Western District of Washington seeking, among other things, a declaratory judgment that BNSF has violated a 1991 Right-of-Way Easement Agreement between the Tribe and BNSF's predecessor-in-interest, Burlington Northern, Inc. (Easement Agreement). The complaint alleges that the number of trains, the number of cars that comprise these trains, and the failure to annually report the nature of the materials that BNSF is transporting across tribal lands violate the Easement Agreement. Accordingly, the Tribe also seeks injunctive relief (1) limiting rail service over the Anacortes Subdivision to Tesoro's refinery and (2) barring BNSF from transporting Bakken crude oil over the Reservation easement. See Swinomish Indian Tribal Cnty. v. BNSF Ry., No. 2:15-cv-00543, Complaint (W.D. Wash. filed Apr. 7, 2015). Tesoro is not a party to the district court litigation. In response to the Tribe's complaint, BNSF sought to dismiss or, alternatively, stay the court case and refer it to the Board so the Board could address what BNSF argued were threshold questions within the Board's jurisdiction, including preemption under § 10501(b). However, the court denied BNSF's motion. See Order Denying Mot. to Dismiss, No. 2:15-cv-00543, ECF No. 19 (W.D. Wash. filed Sept. 11, 2015). On July 21, 2016, the Swinomish Tribe filed an amended motion for summary judgment asking the court, among other things, to find that § 10501(b) does not preempt the Easement Agreement or the Indian Right of Way Act. See Swinomish Tribe Amended Mot. for Summary Judgment, No. 2:15-cv-00543, ECF No. 58 (W.D. Wash. filed July 21, 2016).² BNSF filed a cross-motion for summary judgment, arguing that the Tribe's attempts to limit rail traffic over the easement are preempted. BNSF Cross-Mot. for Summary Judgment, No. 2:15-cv-00543, ECF No. 63 (W.D. Wash. filed Aug. 8, 2016). Both motions are fully briefed.

Tesoro's Request for a Declaratory Order. According to Tesoro, it filed its petition requesting that the Board issue a declaratory order to protect its interest in receiving uninterrupted rail service. (Tesoro Pet. 6.) Tesoro argues that it is not requesting that the Board interpret the Easement Agreement or resolve the allegations between the parties to the court action, as Tesoro itself is not a party to the lawsuit or to the Easement Agreement that is in dispute. (Id. at 7.) Rather, Tesoro asserts that it is concerned because the Swinomish Tribe has requested relief that would challenge federal protections provided to shippers on railroads within the Board's jurisdiction. (Id. at 3.) Thus, Tesoro argues that the Board should make clear that federal law protects rail shippers' interests in receiving rail service over the interstate rail network and does not allow contracts between landowners and railroads to be used to restrict rail service that shippers need.³ (Id. at 7.)

² The Tribe filed its original motion for summary judgment on March 10, 2016.

³ In a subsequent pleading filed on September 28, 2016, Tesoro reasserted its arguments and requested that the Board rule expeditiously on its petition.

On July 13, 2016, the Swinomish Tribe filed a letter expressly declining to become a party to any Board proceeding commenced in response to Tesoro's declaratory order request. The Tribe asserted that the district court was the appropriate forum to resolve the questions presented in Tesoro's petition, and provided copies of pleadings and exhibits from the district court litigation so that the Board could have a more complete and accurate record of the past and pending court proceedings and the Tribe's positions in those proceedings. (Swinomish Letter 2-3.)

Also on July 13, the Suquamish Tribe filed comments urging the Board to dismiss Tesoro's petition and decline to issue a declaratory order because the district court had already ruled that jurisdiction properly lay with the federal court and a Board proceeding would be duplicative. (Suquamish Reply 1-2.)

On July 20, 2016, the Tulalip Tribes, a federally recognized Indian tribe comprising the Snohomish, Snoqualmie, Skykomish tribes and allied bands, also filed comments in opposition to Tesoro's petition. The Tulalip Tribes state that, given the pending federal court litigation addressing the same dispute raised by Tesoro in its filing and the intertwined issues of federal Indian law, the Board should dismiss Tesoro's petition. (Tulalip Reply 1.)

Petitions to Intervene. On June 20, 2016, Equilon Enterprises LLC d/b/a Shell Oil Products US (Shell) filed a motion to intervene in this proceeding and also requested that the Board issue a declaratory order to remove uncertainty created by the dispute in federal court between the Swinomish Tribe and BNSF over the terms of the Easement Agreement. Shell states that it also receives rail service from BNSF over the Anacortes Subdivision to and from its Puget Sound Refinery (PSR) near Anacortes, Wash., and also has plans for a proposed crude offloading facility that would serve PSR in the near future. Accordingly, it also seeks to affirm its right to rail service necessary to meet its current and future business needs.⁴

On June 23, 2016, BNSF filed a motion under 49 C.F.R. § 1112.4 to intervene in this proceeding. BNSF states that it supports the petitions of Tesoro and Shell for an order declaring that shippers on the interstate rail network have a right under the Interstate Commerce Act to receive rail service without interference by landowners whose property the rail line crosses. Because the Board declines to institute a proceeding in this matter, the petitions to intervene will be denied. However, in the interest of having a more complete record, the Board will accept the filings of Shell and BNSF as reply comments in support of Tesoro's request for a declaratory order.

PRELIMINARY MATTERS

Simultaneously with the filing of its petition, Tesoro filed a motion for a protective order to protect the confidential and commercially sensitive information contained in the unredacted version of the petition and verified statement, which Tesoro submitted under seal in this

⁴ By letter filed on November 2, 2016, Shell states that it has suspended work on the proposed crude offloading facility due to business considerations. Shell, however, reaffirms its request that the Board grant Shell's motion to intervene and request for relief detailed in Shell's petition.

proceeding. Shell also filed a motion for protective order to protect the confidential information it submitted in support of its petition. Because the motions conform to the Board's rules at 49 C.F.R. § 1104.14 governing protective orders to maintain the confidentiality of materials submitted to the Board, and issuance of the order would ensure that confidential information would be used solely for this proceeding and not for other purposes, the motions will be granted and a modified protective order will be entered, as found in the Appendix to this decision.

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 (formerly 49 U.S.C. § 721) to issue a declaratory order to eliminate a controversy or remove uncertainty.

Here, the Board will decline to issue such a declaratory order. Tesoro is not a party to the Swinomish Tribe's ongoing breach of contract and trespass litigation, but Tesoro is presenting its preemption claim to the Board as part of its assertion that it has a right to receive rail service as a shipper. However, the complaint and pending summary judgment motions before the district court present the question of preemption of the same contract under the same statute (49 U.S.C. § 10501(b)) that Tesoro is asking the Board to address. Tesoro is seeking a declaratory order finding that the Swinomish Tribe's claims against BNSF are largely preempted by § 10501(b)—the same argument BNSF has asserted to the district court. As the Board has stated, issues involving federal preemption under 49 U.S.C. § 10501(b) can be decided either by the Board or the courts in the first instance. See, e.g., 14500 Ltd.—Pet. for Declaratory Order, FD 35788, slip op. at 2 (STB served June 5, 2014); CSX Transp., Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 8 (STB served May 3, 2005).

Moreover, the district court has already denied BNSF's motion for dismissal or a stay, in which BNSF argued that the Tribe's claims were preempted under § 10501(b) and that the dispute should be referred to the Board because it has primary jurisdiction. As the district court stated in its September 11, 2015 Order:

In the context of this case, referral to the STB is neither efficient nor necessary. The preemption issue can be decided by this Court: it is, at base, a legal question that can be resolved without the delay of initiating a separate agency action. Defendant offers no reason to believe that the relevant facts related to its operations are complex or that an intimate knowledge of transportation policy is required to adjudicate the preemption issue. If plaintiff's breach of contract claim and request for injunctive relief are not preempted, their resolution will require a thorough knowledge of Washington contract law and a balancing of the various interests represented by the ICCTA and the Indian Right-of-Way Act of 1948 . . . While the STB would be able to shed light on the nature of the common carrier's obligations and the importance of uniformity in the regulation of rail transportation, those issues are addressed in the statute and published agency decisions

Order Denying Mot. to Dismiss, No. 2:15-cv-00543, ECF No. 19 (W.D. Wash. filed Sept. 11, 2015). Given that the district court has already denied a motion to refer the preemption issue to the Board, that courts as well as the Board can decide issues involving § 10501(b) preemption in the first instance, and that the court has clearly expressed its preference to decide the preemption issue itself, the Board will decline to issue a declaratory order in this matter.⁵

Shell's petition for declaratory order is likewise denied for the reasons stated above with respect to Tesoro's petition.

It is ordered:

1. Tesoro's petition for declaratory order is denied, and this proceeding is discontinued.
2. The motions for protective order are granted, and a modified protective order and undertakings, attached in the Appendix to this decision, will be adopted.
3. Shell's motion to intervene is denied, and its petition for declaratory order is denied, but its pleading is accepted into the record as a reply comment.
4. BNSF's motion to intervene is denied, but its pleading is accepted into the record as a reply comment.
5. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman. Commissioner Begeman dissented with a separate expression.

COMMISSIONER BEGEMAN, dissenting:

The Board majority may be content with allowing the concerns of Tesoro Refining & Marketing Company, LLC (Tesoro) to be incidentally resolved by the district court as part of the pending dispute between the Swinomish Indian Tribal Community (Swinomish Tribe) and the BNSF Railway Company (BNSF), but I am not. There is no dispute that both the courts and the Board can decide issues involving federal preemption. However, the preemption issues raised in the pending litigation between the Swinomish Tribe and BNSF are *not* the same issues raised by Tesoro, and both sets of issues deserve resolution.

Depending on the conclusion of the pending district court litigation, the parties could end up back here asking the Board to address Tesoro's concerns of interference with BNSF's common carrier obligations. Board precedent already tells us, as a general principle, that private

⁵ In ruling on the preemption issue, the Board notes that the court may be guided by the Board's recent decisions discussing the interplay between § 10501(b) preemption and contract law. See, e.g., Pet. of Union Pac. R.R. for Declaratory Order, FD 35960 (STB served Sept. 30, 2016); Ingredion Inc.—Pet. for Declaratory Order, FD 36014 (STB served Sept. 30, 2016).

contracts between carriers and third parties cannot excuse carriers from meeting their common carrier obligations to shippers.⁶ The Board should set a procedural schedule to answer Tesoro's petition and start the proceeding with questions regarding the applicability of that precedent to this case.

⁶ See, e.g., R.R. Ventures—Aban. Exemption—Between Youngstown, Ohio, & Darlington, Pa., in Mahoning & Columbiana Ctys., Ohio, & Beaver Cty., Pa., AB 556 (Sub-No. 2X) et al., slip op. at 3 (STB served Jan. 7, 2000) (“While the Board encourages privately negotiated agreements, any contractual restrictions that unreasonably interfere with common carrier operations are deemed void as contrary to public policy.”), aff’d sub nom. R.R. Ventures v. STB, 299 F.3d 523, 560-63 (6th Cir. 2002).

APPENDIX

PROTECTIVE ORDER

1. For purposes of this Protective Order:

(a) “Confidential Documents” means documents and other tangible materials containing or reflecting Confidential Information.

(b) “Confidential Information” means traffic data (including but not limited to waybills, abstracts, study movement sheets, and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets, or other data bases, and cost work papers), the identification of specific customers or potential customers, the confidential terms of contracts with customers, suppliers, carriers or other entities, confidential financial and cost information, and other confidential or proprietary business or personal information.

(c) “Designated Material” means any documents designated or stamped as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in accordance with paragraphs 2 or 3 of this Protective Order, and any Confidential Information contained in such materials.

(d) “Proceedings” means those before the Surface Transportation Board (“Board”) concerning the Petition for Exemption filed in Docket No. FD 36041, and any related proceedings before the Board, and any judicial review proceedings arising from the same or from any related proceedings before the Board.

2. If any party to these Proceedings determines that any part of a document it submits, discovery request it propounds, discovery response it produces, transcript of a deposition or hearing in which it participates, or pleading or other paper to be submitted, filed or served in these Proceedings contains Confidential Information or consists of Confidential Documents, then that party may designate and stamp such Confidential Information and Confidential Documents as “CONFIDENTIAL.” Any information or documents designated or stamped as “CONFIDENTIAL” shall be handled as provided for hereinafter.

3. If any party to these Proceedings determines that any part of a document it submits, discovery request it propounds, discovery response it produces, transcript of a deposition or hearing in which it participates, or pleading or other paper to be submitted, filed or served in these Proceedings contains rate or cost data, marketing or financial materials, or other competitively sensitive or proprietary information, then that party may designate and stamp such Confidential Information as “HIGHLY CONFIDENTIAL.” Any information or documents so designated or stamped shall be handled as provided hereinafter.

4. Information and documents designated or stamped as “CONFIDENTIAL” may not be disclosed in any way, directly or indirectly, to any person or entity except to an employee, counsel, consultant, or agent of a party to these Proceedings, or an employee of such counsel, consultant, or agent, who, before receiving access to such information or documents, has been

given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit A to this Order.

5. Information and documents designated or stamped as “HIGHLY CONFIDENTIAL” may not be disclosed in any way, directly or indirectly, to any employee of a party to these Proceedings, or to any other person or entity except to an outside counsel or outside consultant to a party to these Proceedings, or to an employee of such outside counsel or outside consultant, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit B to this Order.

6. Any party to these Proceedings may challenge the designation by any other party of information or documents as “CONFIDENTIAL” or as “HIGHLY CONFIDENTIAL” by filing a motion with the Board or with an administrative law judge or other officer to whom authority has been lawfully delegated by the Board to adjudicate such challenges.

7. Designated Material may not be used for any purposes, including without limitation any business, commercial or competitive purposes, other than the preparation and presentation of evidence and argument in Docket No. FD 36041, any related proceedings before the Surface Transportation Board, and/or any judicial review proceedings in connection with Docket No. FD 36041 and/or with any related proceedings.

8. Any party who receives Designated Material in discovery shall destroy such materials and any notes or documents reflecting such materials (other than file copies of pleadings or other documents filed with the Board and retained by outside counsel for a party to these Proceedings) at the earlier of (1) such time as the party receiving the materials withdraws from these Proceedings, or (2) the completion of these Proceedings, including any petitions for reconsideration, appeals, or remands.

9. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to the Board, unless the pleading or other document is submitted under seal, in a package clearly marked on the outside as “Confidential Materials Subject to Protective Order.” See 49 C.F.R. § 1104.14. All pleadings and other documents so submitted shall be kept confidential by the Board and shall not be placed in the public docket in these Proceedings except by order of the Board or of an administrative law judge or other officer in the exercise of authority lawfully delegated by the Board.

10. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to any forum other than this Board in these Proceedings unless (1) the pleading or other document is submitted under seal in accordance with a protective order that requires the pleading or other document to be kept confidential by that tribunal and not be placed in the public docket in the proceeding, or (2) the pleading or other document is submitted in a sealed package clearly marked, “Confidential Materials Subject to Request for Protective Order,” and is accompanied by a motion to that tribunal requesting issuance of a protective order that would require the pleading or other document be kept confidential and not

be placed in the public docket in the proceeding, and requesting that if the motion for protective order is not issued by that tribunal, the pleading or other document be returned to the filing party.

11. No party may present or otherwise use any Designated Material at a Board hearing in these Proceedings, unless that party has previously submitted, under seal, all proposed exhibits and other documents containing or reflecting such Designated Material to the Board, or to an administrative law judge or other officer to whom relevant authority has been lawfully delegated by the Board, and has accompanied such submission with a written request that the Board, administrative law judge or other officer (a) restrict attendance at the hearing during any discussion of such Designated Material, and (b) restrict access to any portion of the record or briefs reflecting discussion of such Designated Material in accordance with this Protective Order.

12. If any party intends to use any Designated Material in the course of any deposition in these Proceedings, that party shall so advise counsel for the party producing the Designated Material, counsel for the deponent, and all other counsel attending the deposition. Attendance at any portion of the deposition at which any Designated Material is used or discussed shall be restricted to persons who may review that material under the terms of this Protective Order. All portions of deposition transcripts or exhibits that consist of, refer to, or otherwise disclose Designated Material shall be filed under seal and be otherwise handled as provided under the terms of this Protective Order.

13. To the extent that materials reflecting Confidential Information are produced by a party in these Proceedings, and are held and/or used by the receiving person in compliance with the terms of this Protective Order, such production, disclosure, holding, and use of the materials and of the data that the materials contain are deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. § 11904 or of any other relevant provision of the ICC Termination Act of 1995.

14. All parties must comply with all of the provisions of this Protective Order unless the Board or an administrative law judge or other officer exercising authority lawfully delegated by the Board determines that good cause has been shown warranting suspension of any of the provisions herein.

15. Nothing in this Protective Order restricts the right of any party to disclose voluntarily any Confidential Information originated by that party, or to disclose voluntarily any Confidential Documents originated by that party, if such Confidential Information or Confidential Documents do not contain or reflect any Confidential Information originated by any other party.

16. All parties must file simultaneously a public version of any Highly Confidential or Confidential submission filed with the Board whether the submission is designated a Highly Confidential Version or Confidential Version. When filing a Highly Confidential Version, the filing party does not need to file a Confidential Version with the Board, but must make available (simultaneously with the party's submission to the Board of its Highly Confidential Version) a Confidential Version reviewable by any other party's in-house counsel. The Confidential Version may be served on other parties in electronic format only. In lieu of preparing a Confidential Version, the filing party may (simultaneously with the party's submission to the

Board of its Highly Confidential Version) make available to outside counsel for any other party a list of all “highly confidential” information that must be redacted from its Highly Confidential Version prior to review by in-house personnel, and outside counsel for any other party must then redact that material from the Highly Confidential Version before permitting any clients to review the submission.

Exhibit A

UNDERTAKING – CONFIDENTIAL MATERIAL

I, _____ have read the Protective Order served on [INSERT SERVICE DATE], governing the production and use of Confidential Information and Confidential Documents in Docket No. FD 36041, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in Docket No. FD 36041, any related proceedings before the Surface Transportation Board, and/or any judicial review proceedings in connection with Docket No. FD 36041 and/or with any related proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof, and that at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting materials designated or stamped as “CONFIDENTIAL,” other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing Confidential Information or Confidential Documents shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Name: _____

Dated: _____

Exhibit B

UNDERTAKING – HIGHLY CONFIDENTIAL MATERIAL

I, _____ am outside [counsel] [consultant] for _____, for whom I am acting in this proceeding. I have read the Protective Order served on [INSERT SERVICE DATE], governing the production and use of Confidential Information and Confidential Documents in Docket No. FD 36041, understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in Docket No. FD 36041, any related proceedings before the Surface Transportation Board, or any judicial review proceedings in connection with Docket No. FD 36041 and/or with any related proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed undertakings in the form hereof.

I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any information or documents designated or stamped as “HIGHLY CONFIDENTIAL,” that I will take all necessary steps to assure that said information or documents be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said materials or information by employees of my client or its subsidiaries, affiliates, or owners, and that at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting information or documents designated or stamped as “HIGHLY CONFIDENTIAL,” other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this undertaking and that other parties producing Confidential Information or Confidential Documents shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Name: _____
OUTSIDE [COUNSEL] [CONSULTANT]

Dated: _____